In The Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1087

BENEFICIAL FINANCE COMPANY OF JACKSONVILLE,
a Florida corporation,

Petitioner,

vs.

JOHN E. HARRIS,

Respondent.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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Appellant respectfully prays that a Writ of Certiorari issue to review the final order of the Supreme Court of the State of Florida entered herein on July 30, 1976, Petition for Rehearing denied on November 9, 1976.

OPINION BELOW

The opinion of the Supreme Court of Florida is reported at 338 So.2d 196 (Fla. 1976) and is set forth in the Appendix, infra pp. A - 1-10.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257 (3), this being a petition for Writ of Certiorari which draws into question the validity of Florida Statutes, §559.72 (4) and Florida Statutes, §559.77 (1) infra, pp. 2-3, on the ground that they are repugnant to the Constitution of the United States. On July 30, 1976 the Supreme Court of Florida upheld the validity of these statutes. A Petition for Rehearing was denied on November 9, 1976.

QUESTIONS PRESENTED

1. Whether Florida Statutes, §559.72 (4) which prohibits any communication between a person and a debtor's employer in collecting a consumer claim without the debtor's permission or acknowledgment, violates the First Amendment.

2. Whether Florida Statutes, §559.77 (1) which arbitrarily provides a minimum award of five hundred dollars without regard to actual damages or malice is unreasonable and in violation of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involves the First and Fourteenth Amendments to the Constitution of the United States. This case also involves §559.72 (4), Florida Statutes, which states:

> "In collecting consumer claims, whether or not licensed by the division, no person shall:
>
> (4) Communicate or threaten to communicate with a debtor's employer prior to obtaining final judgment

> against the debtor, unless the debtor gives his permission in writing to contact his employer or acknowledges in writing the existence of the debt after the debt has been placed for collection, but this shall not prohibit a person from telling the debtor that his employer will be contacted if a final judgment is obtained." Consumer Collection Practices, Florida Statutes, §559.72 (4).

Also, this case involves §559.77 (1), Florida Statutes, which states:

> "(1) A debtor may bring a civil action against a person violating the provisions of this part in the circuit court of the county in which the alleged violator resides or has his principal place of business or in the county wherein the alleged violation occurred. Upon adverse adjudication, the defendant shall be liable for actual damages or five hundred dollars, whichever is greater, together with court costs and reasonable attorney's fees incurred by the plaintiff. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper, including enjoining the defendant from further violations of this part. If it appears to the court that the suit brought by the plaintiff was ill-founded or brought for purposes of harassment, the plaintiff shall be liable for court costs and reasonable attorney's fees incurred by the defendant." Consumer Collection Practices, Florida Statutes, §559.77(1).

STATEMENT OF THE CASE

1. Proceedings in the Trial Court

In January, 1975, respondent filed a complaint against the appellant. The complaint alleged violations of Florida Statutes, §559.72 (4). Appellant filed a Motion to Dismiss which was granted with leave to amend.

On June 13, 1975, an Amended Complaint was filed by respondent. pp. A - 17-19. The Amended Complaint alleges that on October 1, 1973, the petitioner made a loan to respondent for his personal family and household needs. On September 3, 1974, an agent of appellant "communicated" with an agent of respondent's employer. Further, on September 27, 1974, an agent visited the respondent's employer and communicated with him. It is alleged the communications were in an effort to collect the money the respondent owed appellant. Further, respondent's employment was allegedly terminated by his employer as a result of the "communications" and he was unable to gain employment for two months. The Amended Complaint charges that the "communication" violates Florida Statutes, §559.72 (4) and requests damages pursuant to Florida Statutes, §559.77 (1).

Beneficial filed an Amended Motion to Dismiss stating Florida Statutes, §559.72 (4) violates the First Amendment, and the five hundred dollar minimum damage clause of Florida Statutes, §559.77 (1) is repugnant to the Due Process Clause of the Fourteenth Amendment. pp. A - 15-16.

On September 24, 1975, the trial judge declared Florida Statutes, §559.72 (4) constitutional and the five hundred dollar minimum damage clause in violation of the Fifth and Fourteenth Amendments.

2. Proceedings in the Supreme Court of Florida

The respondent appealed the ruling that the minimum dam-

age award is repugnant to the Due Process Clause. The appellant filed a cross appeal concerning the trial judges' order upholding the validity of Florida Statutes, §559.72 (4).

After oral argument the Supreme Court of Florida ruled directly on the constitutionality of both statutes and upheld their validity. A Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

The Federal Questions Are Substantial

FIRST. As construed by Florida's highest court, Florida Statutes, §559.72 (4) permits a corporation or individual who has a constitutional right to free speech in the dissemination or gathering of truthful information in the market place to be muzzled by the arbitrary acts or omissions of a debtor. This chilling effect on the free flow of commercial information guaranteed by the Constitution is not in the public interest and raises serious questions under the First Amendment of the Constitution of the United States.

SECOND. The Supreme Court of Florida's construction of Florida Statutes, §559.77 (1), which allows the substantial award of five hundred dollars per violation to pass from the property of a creditor to a debtor when the damages are determinable and malice is not required to be proven, raises serious questions under the Due Process of the Fourteenth Amndment of the Constitution of the United States.

I.

FLORIDA STATUTES, §559.72 (4) WHICH PROHIBITS ANY COMMUNICATION BETWEEN A PERSON AND A DEBTOR'S EMPLOYER IN COLLECT-

ING A CLAIM WITHOUT THE DEBTOR'S PRIOR PERMISSION OR ACKNOWLEDGMENT, VIOLATES THE FIRST AMENDMENT.

This Court has long held that the right to free expression is one of the cornerstones of Anglo-Saxon democratic institutions. See *Kilbourn vs. Thompson*, 103 U.S. 168, 202 (1880). The First Amendment of the Constitution of the United States guarantees this freedom shall not be abridged. It is not surprising, therefore, that the freedom of speech has been made binding on the states by the Due Process Clause of the First Amendment. *Lovel v. Griffin*, 303 U.S. 444 (1937). Indeed, the right of free expression is recognized by the Constitution of Florida. See Florida Const. Art. I, §4.

In upholding the validity of Florida Statutes, §559.72 (4) the Supreme Court of Florida described the Consumer Collection Practices Act as "a laudable legislative attempt to curb . . . a series of abuses in the area of debtor relations." The Court reasoned Florida Statutes §559.72 (4) proscribed "harassment of a debtor through contact with his employer about an obligation to a third party." Therefore, the type of speech proscribed by the statute is "commercial" in nature.

The highest Court of Florida reviewed the recent decision of this Court, *Virginia St. Bd. of Pharmacy vs. Va. Cit. Consumer Council*, 96 S. Ct. 1817, 48 L.Ed. 2d 346 (1976) and based its decision on its holding. The Court recognized that "speech which does no more than propose a commercial transaction does not lack all First Amendment protection." p. A - 5. But the Florida Court then misinterpreted Justice Blackmun by inferring that the First Amendment is to protect the "recipient" of the information without consideration of the right of the disseminator. p. A - 5. The Justices then decided that the recipient (the respondent's employers) do not "have

any similar interest in the information they received from Beneficial's agents" compared with the Consumer Council in the *State Board of Pharmacy* case. Deciding that the respondent's credit problems were not "a matter of public interest," the Court applied a balancing test to uphold the validity of the statute.

The deviation from established First Amendment principles and the misconstruction of this Court's opinion in the *State Board of Pharmacy* case make the First Amendment question presented of critical importance to the definition of free speech.

FIRST. In the *State Board of Pharmacy* case this Court stated:

"Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.

Moreover, there is another consideration that suggests that no line between publicly "interesting" or "important" commercial advertising and the opposite kind could ever be drawn. Advertising, however, tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources

> in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Va. St. Bd. of Pharmacy vs. Va. Cit. Consumer Council*, 96 S.Ct. 1817, 1827; 48 L.Ed. 2d 346, 360 (1976).

The information communicated by Beneficial may not have been a matter of public interest, but Beneficial's right to communicate should not be restrained by the state. We agree with the Court and see little difference that Beneficial cast itself as a commentator on credit ratings. The information is freely communicated between Beneficial and employers, and the Supreme Court of Florida misapplied a balancing test.

SECOND. Florida Statutes, §559.72 (4) has no parameters proscribing the communications because they are false and misleading. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." *Va. St. Bd. of Pharmacy vs. Va. Cit. Consumer Council*, supra at 1830; *Gertz vs. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); and *Konigsberg vs. State Bar*, 366 U.S. 36, 49 and n. 10, (1961). However, there is no claim that the communications were untruthful.

THIRD. The highest Court of Florida inferred that Florida Statutes §559.72 (4) was valid as a "time, place and manner restriction." This Court has held such restrictions on speech constitutional if "they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels of communication of the information." *Va. St. Bd. of Pharmacy vs. Va. Cit. Consumer*

Council, 96 S. Ct. 1817, 1830; 48 L.Ed. 2d 346, 364 (1976).

Florida Statutes, §559.72 (4) is a blatant attempt by the Florida Legislature to control the dissemination of credit information. The statute is directed toward the content of the speech and allows the time of the dissemination of the information to be controlled by the arbitrary whim of a debtor. The bounds of time, place, and manner restrictions on commercial free speech are clearly exceeded by this statute.

FOURTH. In the *State Board of Pharmacy* case, Justice Blackmun speaking for the majority cited *Dun & Bradstreet, vs. Grove*, 404 U.S. 898, 904-906 (1971) (Douglas, J. dissenting from denial of certiorari) as an excellent example of the type of protected information needed for intelligent, well informed economic decisions. *Va. St. Bd. of Pharmacy vs. Va. Cit. Consumer Council*, supra at 1827. In *Dun & Bradstreet* credit information concerning an allegedly unsatisfied judgment was communicated. The alleged debtor's trustee in bankruptcy sued, stating the information contributed to the debtor's financial demise. See *Dun & Bradstreet, Inc. vs. Grove*, 404 U.S. 898 (1971) (Douglas, J. dissenting from denial of certiorari); 438 F. 2d 433 (3rd Cir. 1971). The information conveyed in *Dun & Bradstreet, Inc.* is directly analogous to the information communicated by Beneficial. The statute's broad prohibition against any "communication" while collecting consumer claims irreversibly collides with this Court's holding in *State Board of Pharmacy*. This Court's reasoning that the free flow of such information is indispensable was ignored by the Florida Supreme Court. Such an omission emphasizes the substantial need for granting the Writ.

FIFTH. Florida Statutes, §559.72 (4) restricts the time the communication can take place. The statute requires " . . . the

debtor gives his permission in writing to contact his employer or acknowledges in writing the existence of the debt after the debt has been placed for collection, ..." Consumer Collection Practices, Florida Statutes §559.72 (4). This legislative prior restraint on speech presents a substantial First Amendment question. The statute provides no standards concerning the debtor's permission or acknowledgment. The creditor's First Amendment rights are made subservient to and contingent upon the capricious will of the debtor. This Court has stated, "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitional validity." *Organization for a Better Austin vs. Keefe*, 402 U.S. 415, 419 (1971). The opinion of the Florida Supreme Court neglects to deal with this "heavy presumption" against constitutional validity.

II.

FLORIDA STATUTES, §559.77 (1), WHICH ARBITRARILY PROVIDES A MINIMUM AWARD OF FIVE HUNDRED DOLLARS WITHOUT REGARD TO ACTUAL DAMAGES OR MALICE, IS UNREASONABLE AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has long held the ancient principle that no person could be deprived of property except by due process of law is perhaps the very essence of our plan of ordered justice. *Wolfe vs. Colorado*, 338 U.S. 25 (1948). The Magna Charta stated that "No free man shall be . . . disseised . . . but by . . . the law of the land." *Poulsen vs. Portland*, 19 P. 450, 453 (1888). The Fourteenth Amendment declaration that no state shall "deprive any person of . . . property without due process of law" is merely another expression of that

thousand year old ideal of our jurisprudence.

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing." *Ochoa vs. Hernandez Y Morales*, 230 U.S. 139, 161 (1913).

The Due Process Clause of the Fourteenth Amendment does not prohibit governmental regulations for the public welfare, but merely requires that the end shall be accomplished by methods consistent with due process, and the guarantee of due process demands only that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relationship to the object sought to be obtained. *Nebbia vs. New York*, 291 U.S. 502, 537 (1934).

The highest Court of Florida neglected these principles in upholding the constitutionality of Florida Statutes, §559.77 (1). The opinion of the Supreme Court of Florida that the five hundred dollars minimum damage award is constitutional is a direct attack on the principle that property shall not be taken without due process and is a misconstruction of decisions of this Court warranting review by Writ of Certiorari.

FIRST. The Supreme Court of Florida states that the minimum damage award is "sustainable as providing for liquidated damages in an area of law in which the ascertainment of the dollar amount of actual damages sustained in most instances will be extremely difficult, if not impossible, to achieve – a classic situation for application of liquidated damages." pp. A-7-8.

In so ruling, the Court creates a "legal fiction" in order to justify its decision. In his Amended Complaint, respondent states that as a result of the communications by Beneficial he was terminated from his employment and was unable to gain other employment for two months. The quantity of alleged actual damages in lost wages is easily ascertainable in this case. Other elements of compensatory damage such as loss of reputation have been determined by judges and juries throughout the history of American jurisprudence. Indeed, the Supreme Court of Florida has determined that injury to reputation is an element of compensatory damages in libel and slander cases to be determined by a judge or jury. *Miami Herald Pub. Co. vs. Brown*, 66 So. 2d 679 (Fla. 1953). Resultantly, the Court's first justification for upholding the statute does not withstand scrutiny.

Analogy was made to this Court's decisions upholding double damage awards against due process challenges. However, the Florida Supreme Court ignored the distinction that double damage awards are based on ascertainable actual damages. See *Missouri Pacific Ry. Co. vs. Tucker*, 230 U.S. 340 (1913). In further justification of its decision, the Court cited *Morning vs. Family Publications Service*, 411 U.S. 356 (1973). In that case this Court upheld Section 121 of the Truth and Lending Act providing for a minimum damage of $100.00. "Since the civil penalty prescribed is modest and the prohibited conduct

clearly set out in the regulation, we need not construe this section as narrowly as a criminal statute providing graver penalties, such as prison terms." Id. at 376. In relying on this case, the Florida Supreme Court ignored the requirement that the penalty be "modest" and the prohibited conduct clearly set out. As discussed in the First Amendment argument, Florida Statutes, §559.72 (4) is a poorly defined blanket prohibition on "communication" between a "person" and a debtors employer "in collecting consumer claims." The word communication is only narrowed by the phrase in collecting consumer claims. This phrase is only defined to the extent of defining a consumer claim but fails to define who must initiate the communication, what information may or may not violate the statute and/or whether violations are limited to communications made in the course of employment. The ambiguity of this statute falls outside of the requirement of clarity of notice stated by this Court in *Morning*. Further, a five hundred dollar award per communication is clearly not modest or nominal.

SECOND. The Florida Supreme Court states the minimum award may also be characterized as punitive damages "designed to dissuade consumer collection agencies from engaging in the conduct proscribed, even where the legal standard of malice is not met." In so doing, the Court ignores this Courts holding in *Gertz vs. Welch*, 418 U.S. 323 (1974). *Gertz* involved a libel action and this Court stated:

> "Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money

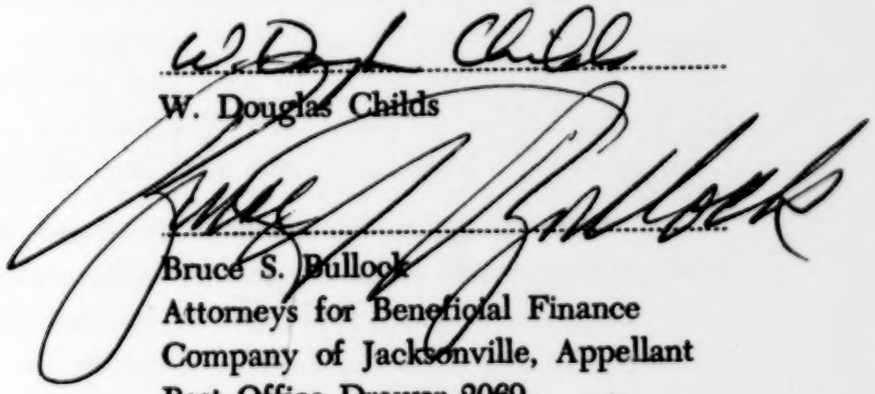
> damages far in excess of any actual injury. . . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." Id. at 349.

This requirement that malice be present in order to award punitive damages in the face of First Amendment rights is enforced by the Due Process Clause of the Fourteenth Amendment. Since the Appellant is charged with simply "communicating" with the Respondent's employer, First Amendment considerations are applicable in this case. The state has no interest in securing money damages in excess of actual injury. The Supreme Court of Florida's characterizations of the minimum damage award as punitive raises serious constitutional questions which should be clarified by this Court.

CONCLUSION

For the foregoing reasons, it is requested that a Writ of Certiorari be granted to review the judgment of the Supreme Court of Florida.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been furnished to the following by first class United States mail this 3rd day of February, 1975:

Alan A. Alop, Esquire
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APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REPETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1976

CASE NO. 48,198

Circuit Court
Case No. 75-469 CA DIV. "A"

JOHN E. HARRIS,
Appellant,

v.

BENEFICIAL FINANCE COMPANY OF JACKSONVILLE, a Florida corporation,
Appellee.

Opinion filed July 30, 1976

An Interlocutory Appeal from the Circuit Court in and for Duval County, Sam Goodfriend, Judge

Alan A. Alop, for Appellant

W. Douglas Childs and Bruce S. Bullock of Bullock, Sharp and Childs, for Appellee

SUNDBERG, J.

In this appeal from an interlocutory order entered by the Circuit Court in and for Duval County, our jurisdiction de-

rives from the fact that the trial judge passed upon the constitutionality of portions of Chapter 559, Florida Statutes. While this order does not constitute a final judgment, it can be reviewed in this Court through certiorari. Article V, Section 3 (b) (3), Florida Constitution.

As appears from Appellant's pleadings in the trial court, on October 1, 1973, Beneficial Finance Company of Jacksonville, a Florida corporation, extended a consumer loan to John E. Harris. Harris made payments on this loan through June, 1974, when he found he could no longer make such payments. On or about September 3 and September 27, 1974, agents of the finance company, without his permission, contacted Harris' employer, Western Auto Company, in Jacksonville, Florida, regarding the overdue debt. On both of these occasions, Beneficial's agents communicated with Harris' employer in an effort to collect the outstanding obligation.

In January, 1975, Harris filed an action in the Circuit Court for Duval County, alleging that the defendant had violated the provisions of the Consumer Collection Practices Act (CCPA), Section 559.72(4), Florida Statutes:

> "In collecting consumer claims, whether or not licensed by the division, no person shall:
>
> "(4) Communicate or threaten to communicate with a debtor's employer prior to obtaining final judgment against the debtor, unless the debtor gives his permission in writing to contact his employer or acknowledges in writing the existence of the debt after the debt has been placed for collection, but this shall not prohibit a person from telling the debtor that his employer will be contacted if a final judgment is obtained."

The original complaint was dismissed upon motion of the defendant, Beneficial. Thereupon, plaintiff filed his amended complaint. Ultimately Beneficial filed an amended motion to dismiss the amended complaint, challenging the validity of Section 559.72(4), Florida Statutes, as an unconstitutional infringement of the right of free speech guaranteed by the First Amendment. Also in its amended motion to dismiss, Beneficial contended that Section 559.77(1), Florida Statutes, the remedy provision of the CCPA which allows successful plaintiffs to recover either actual damages or $500, whichever is greater, constituted an unconstitutional deprivation of defendant's property without due process of law.

In an opinion and order dated September 24, 1975, the trial court rejected Beneficial's free speech attack on Section 559.72(4), Florida Statutes, but declared the minimum damage award provision of Section 559.77(1) to be unconstitutional on due process grounds. Plaintiff Harris appeals the latter decision, while defendant Beneficial has filed a cross-appeal on its unsuccessful free speech challenge to the statute.

After carefully considering Beneficial's constitutional challenge to Section 559.72(4), Florida Statutes, we have concluded that it must be rejected. The trial court properly applied the "commercial speech" doctrine to the facts of the instant case. See *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 486 (1942) (commercial handbill); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) (sexually-segregated want ads). Communication directed solely to the collection of a debt is purely commercial. While calling communication "commercial" does not serve to strip it of all constitutional guarantees, communications such as the one at issue here

may more readily be curbed in the public interest than can speech which conveys political, social or religious thought. See generally *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

Bigelow struck down a Virginia law under which a newspaper editor had been convicted for advertising the availability of legal medical abortions in New York. The Court rejected the Commonwealth's argument that the statute was constitutional because it could be applied only to commercial speech. The reason for this decision is instructive:

> "The legitimacy of appellant's First Amendment claim in the present case is demonstrated by the important differences between the advertisement presently at issue and those involved in *Chrestensen* and *Pittsburgh Press*. Portions of its message, most prominently the lines, 'Abortions are now legal in New York. There are no residency requirements,' involve the exercise of the freedom of communicating information and disseminating opinion." *Bigelow* at 2232.

Adding that "the advertisement conveyed information of potential interest and value to a diverse audience" and was newsworthy, the Court found that the speech involved "pertained to constitutional interests," and was protected under the First Amendment.

The United States Supreme Court recently revisited the "commercial speech" doctrine in *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 44 U.S.L.W. 4686 (Opinion filed May 24, 1976). Consumers of prescription drugs sued the State Board of Pharmacy challenging the constitutionality of a Virginia statute declaring it to be unprofessional conduct for a licensed pharmacist to advertise

the prices of prescription drugs. Reasoning that "speech which does 'no more than propose a commercial transaction' " does not lack all First Amendment protection, the Court held the statute to be unconstitutional. In so doing, Mr. Justice Blackmun, writing for the majority, emphasized the value of the type of speech at issue – the price of prescription drugs – to the *recipient* of such information:

> *"As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.* Appellees case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.
>
> "Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely 'commercial,' may be of general public interest. The facts of decided cases furnish illustrations: advertisements stating that referral services for legal abortions are available, *Bigelow v. Virginia, supra;* that a manufacturer of artificial furs promotes his product as an alternative to the extinction by his competitors of fur-bearing mammals, see *Fur Information & Fashion Council, Inc. v.*

> *E. F. Timme & Son,* 364 F.Supp. 16 (SDNY 1973); and that a domestic producer advertises his product as an alternative to imports that tend to deprive American residents of their jobs, cf. *Chicago Joint Board v. Chicago Tribune Co.,* 435 F.2d 470 (CA7 1970), cert. denied, 402 U.S. 973 (1971). Obviously, not all commercial messages contain the same or even a very great public interest element. There are few to which such an element, however, could not be added. Our pharmacist, for example, could cast himself as a commentator on store-to-store disparities in drug prices, giving his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not.' *Id.* at 4690-91.
> (Emphasis supplied) (Footnote omitted)

The Court concluded that while "commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible." Justice Blackmun specifically mentioned the continuing validity of time, place and manner restrictions. *Id.* at 4692.

Careful perusal of *Virginia State Board of Pharmacy* convinces us that the instant statute is yet constitutional. As noted above, the Supreme Court found the dissemination of prescription drug prices, like other advertising information, to be "a matter of public interest." We doubt that Harris' credit problems can be so denominated. Furthermore, the potential recipients of the information sought to be conveyed in the *Board of Pharmacy* case had a striking and obvious interest in acquiring such knowledge. It is difficult for us to believe that Harris' employers have any similar interest in the information they received from Beneficial's agents.

In conclusion, we can discover in the collection procedures of appellee/cross-appellant finance company no significant public interest of the type found by the *Bigelow* and *State Board of Pharmacy* Courts. Thus the proper test in considering this statute is to weigh the individual's interest against the government's interest. *Bigelow,* supra, at 2234-35. We hold that the public interest in proscribing harassment of a debtor through contact with his employer about an obligation to a third party simply transcends a finance company's interest in choosing this particular means of collecting a debt. We note, furthermore, that the statute is restricted by its terms to those communications made "in collecting consumer claims," and so we reject Beneficial's argument that the Act is void for overbreadth.

Beneficial argued successfully before the trial court that the minimum damage provision of Section 559.77(1), Florida Statutes,[1] is unconstitutional as a denial of due process of law. We disagree. The instant statute is sustainable as providing for liquidated damages in an area of the law in which ascertainment of the dollar amount of actual damages sustained in most instances will be extremely difficult, if not impossible, to achieve – a classic situation for application of liquidated

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1. "A debtor may bring a civil action against a person violating the provisions of this part in the circuit court of the county in which the alleged violator resides or has his principal place of business or in the county wherein the alleged violation occurred. Upon adverse adjudication, the defendant shall be liable for actual damages or $500, whichever is greater, together with court costs and reasonable attorney's fees incurred by the plaintiff. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper, including enjoining the defendant from further violations of this part. If it appears to the court that the suit brought by the plaintiff was ill-founded or brought for purposes of harassment, the plaintiff shall be liable for court costs and reasonable attorney's fees incurred by the defendant."

damages. The United States Supreme Court has repeatedly upheld double damage awards against due process challenges. See, *e.g., Lindsey v. Normet,* 405 U.S. 56, 78; 92 S.Ct. 862, 877; 31 L.Ed.2d 36, 53 (1974); *Missouri Pac. Ry. Co. v. Humes,* 115 U.S. 512, 6 S.Ct. 1130, 29 L.Ed. 463 (1885). In *Overnight Motor Trans. Co. v. Missel,* 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682 (1942), a double damage provision under the Fair Labor Standards Act of 1938 (29 U.S.C. §201 et seq.) was sustained against a due process challenge as providing "liquidated damages" of a compensatory nature. See also *Mourning v. Family Publication Serv., Inc.,* 411 U.S. 356, 93 S.Ct. 1653, 36 L.Ed.2d 318 (1973) (either provable damages or $100, whichever is greater, for violations of Federal Truth-in-Lending Act, 15 U.S.C. §1601 et seq.). A case upon which Beneficial relies, *Missouri Pac. Ry v. Tucker,* 230 U.S. 340, 33 S.Ct. 961, 57 L.Ed. 1507 (1913), is clearly distinguishable because there the actual dollar damages sustained by the injured party were readily ascertainable, thus making the imposition by statute of liquidated damages in lieu thereof a denial of due process.

To Harris' assertion that the minimum award under the statute also may be sustained as a form of punitive damages, Beneficial responds that such a provision would be duplicative because the statute expressly provides for punitive damages in the court's discretion. We concur with Harris that the minimum award reasonably can be construed as providing a penalty designed to dissuade consumer collection agencies from engaging in the conduct proscribed, even where the legal standard of malice is not met. In enacting Section 559.72(4), supra, the Legislature prohibited a course of conduct which until then apparently was widely followed by consumer finance companies and collection agencies. The existence of this industrywide standard of practice would

ordinarily be a defense against the imposition of punitive damages based on malicious intent. In the exercise of its police powers the Legislature chose this method of deterring wilful violations of the protective legislation it had enacted. The fact that the Act also authorizes a punitive damage recovery for the traditional case involving malice does not alter characterization of the $500 minimum award as punitive. Had the Legislature failed to include a traditional punitive damages measure, aggrieved consumers might well have been precluded from receiving any award of punitive damages where malice is evident. See *Teamsters Local 20 v. Morton,* 377 U.S. 252, 260-61; 84 S.Ct. 1253, 1258-59; 12 L.Ed.2d 280, 286-87 (1964). We believe that the Legislature intended to preserve common-law punitive remedies while expanding the type of damages available to injured parties under the Act so as to include the separate, statutory measure of damages at issue here.

In short, the minimum award afforded by the statute exhibits aspects of both liquidated and punitive damages. It clearly appears to have been the intent of the Legislature to provide a remedy for a class of injury where damages are difficult to prove and at the same time provide a penalty to dissuade parties such as Beneficial from engaging in collection practices which may have been heretofore tolerated industrywide. Neither objective is without the purview of proper legislative action. The Consumer Collection Practices Act is a laudable legislative attempt to curb what the Legislature evidently found to be a series of abuses in the area of debtor-creditor relations. The legislation provided neither criminal penalties nor administrative enforcement. The minimum damage award and the civil suits it encourages constitute the only means by which the legislative purpose may be vindi-

cated. We decline to strip the CCPA of the only self-enforcing mechanism it possesses.

The judgment of the circuit court is affirmed in part and reversed in part, and the cause is remanded for further proceedings not inconsistent herewith.

OVERTON, C.J., ROBERTS, ADKINS, BOYD, ENGLAND and HATCHETT, J.J., Concur

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IN THE SUPREME COURT OF FLORIDA

JULY TERM, A.D. 1976

CASE NO. 48,198

Circuit Court
Case No. 75-469 CA DIV. "A"

JOHN E. HARRIS,
Appellant,

vs.

BENEFICIAL FINANCE COMPANY OF JACKSONVILLE, a Florida corporation,
Appellee.

PETITION FOR REHEARING

Pursuant to Rule 3.14, Appellee, BENEFICIAL FINANCE COMPANY OF JACKSONVILLE, by and through their undersigned attorneys, respectfully petitions this Court for a rehearing of the Opinion and Decision rendered in this cause on July 30, 1976 and in support thereof state:

1. Confirming the lower Court's ruling that Florida Statutes §559.72 (4) does not violate the right to free speech guaranteed by the First Amendment, this Court inadvertently overlooked and failed to consider all the language and the ultimate holding of the Supreme Court of the United States in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 48 L Ed. 2d 346 (May 24, 1976). In discussing limitations on First Amendment protection of "commercial speech," the Supreme Court makes it clear that no distinction can be drawn between "publically 'interesting' or 'important'" speech of a commercial nature. *Id.* at 360. This language follows directly after the long quote contained in Page 4 of this Court's Opinion. Because no line can be drawn between publically interesting or important speech of a commercial nature, a limitation upon "commercial speech" cannot be based on a balance between the public interest in the content of the speech and the individual's interest. This is the test applied by this Court, and we respectfully submit that this test inadvertently overlooks the holding of the United States Supreme Court.

Also, we respectfully submit that this Court inadvertently overlooked the Supreme Court of the United State's illustration of the fact situation contained in *Dun & Bradstreet, Inc. v. C. R. Grove*, 404 U.S. 898 (1971) as an example of indispensable commercial information. *Id.* at 360. The *Grove* case concerned whether the circulation of credit information was protected by the First Amendment. This case was cited by the Appellants in their Brief as being particularly analogous "commercial speech." See Appellant's Brief at 19. We agree with the Appellants and respectfully submit that this Court inadvertently overlooked this reference to the *Grove* case.

Further, we submit that the limitations on commercial

speech as set out by the Supreme Court of the United States were overlooked by this Court. As stated by Justice Rehnquist in his dissent, commercial speech is protected by the First Amendment "so long as it is not misleading or does not promote an illegal product or enterprise." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, supra at 370. A second limitation as stated by the majority, involves mere time, place, and manner of restrictions. These restrictions are constitutional if "they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels of communication of the information." *Id.* at 364. These restrictions involve regulations such as the anti-noise ordinance tested in *Richard Grayned v. City of Rockford*, 408 U.S. 104 (1972). Another limitation cited by the majority involved the "special problems of the electronic broadcast media." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, supra at 365. None of these limitations are applicable to Florida Statutes §559.72 (4).

2. In reversing the lower Court's ruling that Florida Statutes §559.77 (1) violated the due process clause of the Fourteenth Amendment, we respectfully submit that this Court overlooked the holding in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973). The Court held a civil penalty of $100 constitutional because it is "modest and the prohibited conduct clearly set out in the regulation." *Id.* at 376. The prohibited conduct is not clearly defined by Florida Statutes §559.72 (4). The broad language of the Statute which simply prohibits communication between a creditor and a debtor in collecting consumer claims is not limited by the facts alleged in the Amended Complaint. The Appellant simply alleges that an Agent of the Appellee communicated with

an agent of the Appellant's employer two times. Nowhere in the Complaint is any mention made of who contacted who or what was specifically communicated. The broadness of Florida Statutes §559.72 (4) clearly does not support the minimum penalty of $500. Further, we respectfully submit that the Court overlooked the requirement that the penalty be "modest." We submit that $500 per communication cannot be construed as modest.

WHEREFORE, Appellee respectfully requests this Court to grant a rehearing in this cause, and to declare Florida Statutes §559.72 (4) and the minimum damage clause of Florida Statutes §559.77 (1) unconstitutional.

Respectfully submitted,

BULLOCK, SHARP & CHILDS, P.A.

/s/ W. Douglas Childs

Attorneys for Appellee
Post Office Drawer 2069
Jacksonville, Florida 32203

CERTIFICATE OF SERVICE

I DO CERTIFY that a copy of the foregoing Petition for Rehearing has been furnished by mail this 13th day of August, 1976, to ALAN A. ALOP, ESQ., Attorney for Appellant, 816 Florida Avenue, Jacksonville, Florida 32206.

/s/ W. Douglas Childs

Attorney

IN THE SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 9, 1976

CASE NO. 48,198

JOHN E. HARRIS,

Appellant,

vs.

BENEFICIAL FINANCE COMPANY OF JACKSONVILLE, ETC.,

Appellee.

On consideration of the Petition for Rehearing filed by appellee, it is ordered that said petition is denied.

A True Copy

TEST:
Sid J. White
Clerk Supreme Court.

Y

CC: Hon. S. Morgan Slaughter, Clerk
Hon. Sam Goodfriend, Judge
Hon. W. Douglas Childs,
Hon. Bruce S. Bullock
Hon. Alan A. Alop

IN THE CIRCUIT COURT IN AND FOR DUVAL COUNTY, FLORIDA

NO. 75-469-CA DIVISION: A

JOHN E. HARRIS,

Plaintiff,

vs.

BENEFICIAL FINANCE COMPANY OF JACKSONVILLE, a Florida corporation,

Defendant.

AMENDED MOTION TO DISMISS AMENDED COMPLAINT

Defendant moves this Court for an Order dismissing the Amended Complaint herein on the grounds that it fails to state a cause of action because:

1. Florida Statutes §559.72(4) is void and unconstitutional under both the Constitution of the State of Florida and the Constitution of the United States, specifically §4 of the Declaration of Rights and the First Amendment, respectively, in that it attempts to restrain and abridge free speech.

2. The attempt of Section 559.77(1) to fix a minimum amount of damages is unconstitutional under both the Constitution of the State of Florida and the Constitution of the United States because it deprives the defendant of property without due process of law.

3. Section 559.77(1) is unconstitutional to the extent that it attempts to grant a court discretion to award punitive damages without any guidelines in a purely legislative crea-

tion, in derogation of common law, is unconstitutional under both the Constitution of the State of Florida and the Constitution of the United States because it deprives the defendan of property without due process of law and deprives defendant of its right to a jury determination.

BULLOCK, SHARP & CHILDS, P.A.

Post Office Drawer 2069
Jacksonville, Florida 32203
Attorney for Defendant

CERTIFICATE OF SERVICE

I DO CERTIFY that a copy of the foregoing Amended Motion to Dismiss Amended Complaint has been furnished by mail this 3rd day of July, 1975 to: Alan A. Alop, Esq., Attorney for Plaintiff, Duval County Legal Aid Association, 816 Florida Avenue, Jacksonville, Florida 32206.

Attorney

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 75-469 CA
DIVISION "A"

JOHN E. HARRIS,
Plaintiff,

-vs-

BENEFICIAL FINANCE COMPANY OF JACKSONVILLE, etc.,
Defendant.

AMENDED COMPLAINT

The plaintiff sues the defendant and says:

1. This is a complaint for money damages and injunctive relief under the Consumer Collection Practices Act, Florida Statutes Section 559.55 et al.

2. This Court has jurisdiction pursuant to Florida Statutes Section 559.77(1).

3. The plaintiff, JOHN E. HARRIS, is a resident of Jacksonville, Florida.

4. Defendant, BENEFICIAL FINANCE COMPANY OF JACKSONVILLE, is a Florida corporation engaged in the small loan business, and has its principle place of business in Jacksonville, Florida.

5. On or about October 1, 1973, the defendant extended a loan to the plaintiff for personal, family, and household needs of the plaintiff. Said loan constitutes a consumer claim within

the meaning of Section 559.55(1), Florida Statutes.

6. On or about September 3, 1974, an agent of the defendant communicated with an agent of the plaintiff's employer at that time, Western Auto Company, Jacksonville, Florida, in an effort to collect the outstanding obligation which the plaintiff owed the defendant.

7. On or about September 27, 1974, an agent of the defendant visited the plaintiiff's employer, Western Auto Company, Jacksonville, Florida, and once again communicated with plaintiff's employer in an effort to collect plaintiff's debt to defendant.

8. The actions of the defendant in communicating with the employer of the plaintiff prior to obtaining final judgment against the plaintiff constitute a violation of Florida Statutes Section 559.72(4).

9. As a consequence of the defendant's communication with plaintiff's employer, the plaintiff was terminated from employment at Western Auto Company, Jacksonville, Florida, and was unable to gain employment for two months.

10. Plaintiff has suffered and will suffer irreparable injury if the defendant did not enjoin from continuing to communicate with plaintiff's employers. No adequate remedy at law exists.

WHEREFORE, the plaintiff requests that this Court:

a. Enter a judgment against the defendant and in favor of the plaintiff in the amount of $500.00 per violation, pursuant to Florida Statutes, Section 559.77(1), or actual damages, whichever is greater.

b. Issue an injunction restraining the defendant from communicating with the plaintiff's employers.

c. Award the plaintiff attorney's fees pursuant to Florida Statutes Section 559.77(2).

d. Award such other relief as this Court deems just and proper.

/s/ Alan A. Alop

ALAN A. ALOP, ESQUIRE
Attorney for Plaintiff
Duval County Legal Aid Assoc.
816 Florida Avenue
Jacksonville, Florida 32206

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Bruce S Bullock, Esquire, Attorney for Defendant, 4077 Woodcock Drive, Suite 105, P. O. Drawer 2069, Jacksonville, Florida 32203, by U. S Mail, this 13th day of June, 1975.

/s/ Alan A. Alop

ATTORNEY